No. 355

FILED
AUG 29 1956
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,760.

MELROSE REALTY CO., INC.,
Appellant,

v.

LOEW'S, INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R. K. O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; DANTE IACAMPO, Individually and Formerly Trading as the GLENSIDE THEATRE; GLENSIDE THEATRE CORPORATION and WARNER BROS. THEATRES, INC., Now Known as WARNER THEATRES, INC.

Appeal from a Judgment of the District Court of the United States for the Eastern District of Pennsylvania.

Supplemental Appendix.

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SUPPLEMENTAL APPENDIX.

DOCKET ENTRIES.

Jan. 30, 1952.	Complaint filed.
Jan. 30, 1952.	Summons Exit.
Jan. 30, 1952.	Plaintiff's demand for Jury Trial filed.
Feb. 21, 1952.	Appearance of Bernard G. Segal and Edward W. Mullinix, Esqs. for Loew's Inc., R. K. O. Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc. and Universal Film Corporation filed.
Feb. 25, 1952.	Stipulation of Counsel extending time for filing Answer of Warner Bros. Pictures Distributing Corporation et al. to March 17, 1952 and Order of Court approving same filed. Noted Feb. 26, 1952.
Feb. 27, 1952.	Appearance of Morris Wolf, Esq. and Louis J. Goffman, Esq. for Warner Bros. Pictures Distributing Corporation, Stanley Company of America and Warner Bros. Circuit Management Corporation filed.
Feb. 28, 1952.	Appearance of Cohen and Cohen, Esqs. for Glenside Theatre Corporation filed.
Mar. 6, 1952.	Answer of Glenside Theatre Corporation filed.
Mar. 17, 1952.	Stipulation of Counsel extending time for Answers of Warner Bros. et al. to April 9, 1952 and Order of Court approving same filed. Noted March 18, 1952.

Mar. 25, 1952.	Summons returned "On Feb. 5, 1952 served on Loew's Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, Warner Bros. Pictures Distributing Corporation, Stanley Company of America, Inc., Warner Bros. Pictures Distributing Corporation, Universal Film Exchanges, Inc., United Artists Corporation, R. K. O. Radio Pictures, Inc., Universal Corporation" and "On Feb. 13, 1952 served on Glenside Theatre Corporation" and "Not requested to serve as to Paramount Pictures, Inc., Warner Bros. Pictures, Inc. and Dante Iacampo" and filed.
Apr. 10, 1952.	Answer of Warner Bros. etc. and Stanley Company of America filed.
Apr. 10, 1952.	Answer of Universal Film Exchanges, Inc. filed.
Apr. 10, 1952.	Answer of Columbia Pictures Corporation filed.
Apr. 10, 1952.	Answer of Loew's, Incorporated filed.
Apr. 10, 1952.	Answer of United Artists Corporation filed.
Apr. 10, 1952.	Answer of Twentieth Century-Fox Film Corporation filed.
Apr. 10, 1952.	Answer of R. K. O. Radio Pictures, Inc. filed.
Apr. 30, 1952.	Stipulation of Counsel dismissing as parties defendant Paramount Pictures, Inc., Universal Corporation and Warner Bros. Pictures, Inc. and adding Paramount Film Distributing Corporation as a party defendant and amending Complaint and Order approving same filed. May 1, 1952 Noted.

May 21, 1952. Answer of Paramount Film Distributing Corporation filed.

July 9, 1952. Order to place same on trial list filed.

Oct. 21, 1952. Answer of defendant Glenside Theatre Corporation to plaintiff's Interrogatories filed.

Oct. 30, 1954. Answer of Paramount Film Distributing Corporation to Plaintiff's Interrogatories filed.

Nov. 10, 1954. Answer of Warner Bros. Pictures Distributing Corporation to Plaintiff's Interrogatories filed.

Jan. 5, 1955. Answer of Loew's, Incorporated to Plaintiff's Interrogatories filed.

Jan. 14, 1955. Answer of Universal Film Exchanges, Inc. to Plaintiff's Interrogatories filed.

Feb. 9, 1955. Answer of Twentieth Century-Fox Film Corporation to Plaintiff's Interrogatories filed.

May 19, 1955. Answer of Columbia Pictures Corporation to Plaintiff's Interrogatories filed.

May 20, 1955. Answer of R. K. O. Radio Pictures, Inc. to Plaintiff's Interrogatories filed.

June 6, 1955. Answer of United Artists Corporation to Plaintiff's Interrogatories filed.

Aug. 19, 1955. Defendants' motion for summary judgment and notice of motion filed.

Sept. 7, 1955. Plaintiff's Interrogatories to Glenside Theatre Corporation filed.

Sept. 7, 1955. Plaintiff's Interrogatories to Loew's, Incorporated et al. filed.

Sept. 7, 1955.	Plaintiff's Interrogatories to Warner Bros. Pictures Distributing Corporation et al. filed.
Sept. 7, 1955.	Pre-Trial Examination of Lester Krieger filed.
Sept. 12, 1955.	Argued sur defendants' motion for summary judgment. Eo die. Motion granted.
Sept. 12, 1955.	Judgment granting defendants' motion for summary judgment and entering judgment for defendants, with costs filed. Sept. 13, 1955 Noted and notice mailed.
Sept. 13, 1955.	Transcript of Sept. 12, 1955 filed.
Sept. 21, 1955.	Stipulation of Counsel amending certain pleadings and adding Warner Bros. Theatres, Inc., now known as Warner Theatres, Inc. as a party defendant. filed.
Oct. 11, 1955.	Plaintiff's Notice of Appeal filed. Copies to Schnader, Harrison, Segal and Lewis, Esqs., Wolf, Block, Schorr and Solis-Cohen, Esqs. and Cohen and Cohen, Esqs.
Oct. 11, 1955.	Copy of Clerk's Notice to United States Court of Appeals filed.
Oct. 11, 1955.	Plaintiff's Bond for Costs on Appeal in $250. with Manufacturers Casualty Insurance Company as surety filed.
Oct. 31, 1955.	Record transmitted to U. S. Court of Appeals.

OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Before Hon. William H. Kirkpatrick, *J.*

Philadelphia, Pa., Monday, September 12, 1955.

The Court: I will enter the summary judgment for which the defendant moves.

If I were entirely free I would still follow the views that I set forth in my opinion in the Harrison case, but the Court of Appeals has acted upon it and it is now the law of this Circuit and it is not my province to change it.

It is a familiar principle that where there are two issues involved, either one of which would support the decision of a court, and the court rules upon both of them, it establishes the law as to both those points. In the Court of Appeals in the Harrison case the court specifically referred to the fact that this court considered and disallowed the plaintiff's contention that she was ". . . a person injured, and therefore entitled to sue, under the Clayton Act even though she was a non-operating theatre owner."

That is a quotation from the Court of Appeals opinion, so that they had that issue directly before them, whatever other issues they had. And the Court went on to say that "All of the foregoing contentions were presented to the district court. . . . They were all fully considered and correctly decided. . . . We find ourselves in complete accord with his reasoning and conclusions and need add nothing thereto."

Therefore, the law of this Circuit is settled and I cannot find any substantial difference in the various distinctions cited by counsel for the plaintiff which go to this point. There may be some slight distinctions in the nature of the case and the relationship of the parties, but that is not the point of the case. The point of the case was that the non-operating theatre owner, who hasn't been deprived of her lease, whose tenant is still in business, carrying out

his obligations as to the rent and paying the minimum rent that he was always required to do; that such a theatre owner is simply not a person within the purview of the anti-trust laws, not a person injured in his business within the meaning of the Clayton Act.

MR. ROSENBLUTH: If Your Honor please, may I have an exception to your ruling?

THE COURT: Oh, certainly.

JUDGMENT.

Before KIRKPATRICK, *Ch. J.*

AND NOW, to wit: September 12th, 1955, upon consideration of Defendants' Motion for Summary Judgment, it is ORDERED that said Motion be and the same is hereby Granted and Judgment is hereby entered in favor of Defendants, Loew's, Incorporated; Paramount Film Distributing Corporation; R. K. O. Radio Pictures, Inc.; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Warner Bros. Pictures Distributing Corporation; Stanley Company of America, Inc.; Warner Bros. Circuit Management Corporation; Universal Film Exchanges, Inc.; United Artists Corporation; Dante Iacampo, Individually and formerly trading as the Glenside Theatre, and Glenside Theatre Corporation, and against the Plaintiff, Melrose Realty Co., Inc., with costs.

By THE COURT,

ATTEST:

/s/ J. A. COMEY,
Deputy Clerk.

Office-Supreme Court, U.S.
FILED
AUG 29 1956
JOHN T. FEY, Clerk

32/13

No. 355 .

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,760.

MELROSE REALTY CO., INC.,

Appellant,

v.

LOEW'S, INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R. K. O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; DANTE IACAMPO, Individually and Formerly Trading as the GLENSIDE THEATRE; GLENSIDE THEATRE CORPORATION and WARNER BROS. THEATRES, INC., Now Known as WARNER THEATRES, INC.

Appeal from a Judgment of the District Court of the United States for the Eastern District of Pennsylvania.

PETITION FOR REHEARING.

S. GORDON ELKINS,
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GROUNDS IN SUPPORT OF PETITION.

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PETITION FOR REHEARING.

To The Honorable the Judges of Said Court:

The Petition of Melrose Realty Co., Inc., hereinafter referred to as "Plaintiff," appellant above-named, respectfully represents:

1. That your Honorable Court (Maris, McLaughlin, and Hastie, Circuit Judges) on May 31, 1956 filed its opinion Per Curiam and Judgment in Appeal No. 11,760, affirming the judgment of the District Court.

2. This is an action for treble damages under the Clayton Anti-Trust Act brought by the owner of a Motion Picture Theatre, which leased its theatre to an operating company under a percentage lease agreement. The Plaintiff alleged a conspiracy between its tenant and another motion picture theatre owner and operator together with various motion picture distributors, which conspiracy substantially decreased the receipts of its theatre, and thereby reduced its rentals under the percentage lease.

3. The District Court, Kirkpatrick, J., sustained Defendants' Motion for Summary Judgment on the ground that the Circuit Court of Appeals, in *Harrison v. Paramount Pictures, Inc.*, 211 F. 2d 405 (1954), had decided that a landlord was not a party with a property interest protectable under the Clayton Act.

4. It was Plaintiff's contention that the instant case was distinguishable from the *Harrison* case because in the *Harrison* case, the lessee at time of suit was not a party to the conspiracy, and therefore was free to protect both its and the landlord's rights by bringing suit. Furthermore, since the lessee in the *Harrison* case was not a party to the conspiracy, it was the lessee at whom the conspiracy was directed, so that the landlord was not in the primary line

of fire. In distinction to that situation, the instant case is one in which the lessee is a member of the conspiracy, and therefore is not in a position to bring suit against the other conspirators. Furthermore, since the lessee is a party to the conspiracy, the first immediate party injured in the line of fire is the landlord.

5. Notwithstanding the distinction pressed by Plaintiff, the Circuit Court Opinion made no distinction between the *Harrison* case and the instant case, but stated that the *Harrison* rule ". . . compelled the entry of judgment for the defendants in this case."

6. In support of its position that a new rule is required for a case of a landlord action when its theatre lessee is a party to a conspiracy in restraint of trade, Plaintiff assigns the following grounds:

A. A Theatre Owner-Landlord Has an Interest Protected by the Anti-Trust Laws Where He Is a Party Directly Injured by an Illegal Conspiracy.

In *Steiner v. 20th Century Fox Film Corp.*, CCH Trade Reg. Rep. ¶ 68,304 (9th Cir., March 15, 1956), the court held that a landlord had a proper anti-trust claim for relief against a conspiracy directed at him. In that case, the plaintiff alleged that the conspirators forced plaintiff to receive a lower than reasonable rental and to grant other unfavorable lease terms. The court there recognized that where there were "*direct dealings*" between Plaintiff and Defendants, and where the Plaintiff was in the direct line of fire of the conspiracy, the landlord could maintain an anti-trust action.

The *Harrison* case did not hold otherwise. The rule of that case is that a landlord under a percentage lease, *without more* cannot maintain an anti-trust suit which the lessee is in a position to bring.

However, the instant case is factually different than *Harrison*. In this case, the complaint and depositions show that Plaintiff's lessee was a party to the conspiracy (Complaint, paragraph 26; Krieger Depositions, pp. 25-30), thus putting the landlord in the first line of non-conspirators who were injured. Furthermore, the depositions show that the Defendants were aware of the adverse effect which their agreement would have upon Plaintiff. In fact, one of the conspirators obtained Plaintiff's consent to an experimental period to determine if competition would be affected by the day and date agreement (Krieger Depositions, pp. 32-35). When competitive injury was shown, Plaintiff demanded that the experiment be discontinued, but his demands were ignored (Krieger Depositions, pp. 35-40). These facts clearly establish *direct dealings* between Plaintiff and Defendants so that the *Steiner* case governs this situation, and the *Harrison* case does not apply.

B. A Secondary Party, Without Standing to Bring Anti-Trust Action Against an Illegal Conspiracy When the Primary Party Can Do So, Becomes the Proper Party to Bring Suit When the Primary Party Is a Member of That Conspiracy.

It is well settled that in ordinary situations, a stockholder may not bring a derivative suit for anti-trust damages which a corporation sustained as victim of an illegal conspiracy. *Gerli v. Silk Association of America*, 32 F. 2d 959 (S. D. N. Y., 1939). In such a case, the action is *primarily* that of the corporation and its directors. But where the corporate directors are members of the conspiracy, a stockholders derivative suit will be allowed. *Franchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F. 2d 731 (2d Cir., 1953); *cf. United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 264 (1917). This is so because when the usual primary party becomes a co-conspirator, it is in no position to protect either its own

or a secondary parties' rights. Therefore, the secondary party becomes the proper party to bring suit.

The same principle applies in the landlord-lessee situation. The *Harrison* case holds that where a lessee can sue, the landlord may not. But where a lessee is a party to the conspiracy, then the landlord becomes the party primarily injured by the conspiracy, and as such, is entitled to maintain an anti-trust action.

WHEREFORE, Plaintiff requests that the Court grant a rehearing, in order that the important distinction between the *Harrison* case and the instant case may be further developed and the Court may consider further the Plaintiff's contention that the principle of the *Harrison* case is not to be followed in the instant case.

Respectfully submitted,

S. GORDON ELKINS,
DAVID H. ROSENBLUTH,
LEWIS M. STEVENS,
Attorneys for Appellant.

Dated June 14, 1956.

I hereby certify that the foregoing Petition for Rehearing is submitted in good faith and not for the purposes of delay, and because it is believed that grave injustice has been done.

DAVID H. ROSENBLUTH.

OCT 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 355.

MELROSE REALTY CO., INC.,

Petitioner,

v.

LOEW'S INCORPORATED, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Appellees.

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Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 355.

MELROSE REALTY CO., INC.,
Petitioner,

v.

LOEW'S INCORPORATED, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

THE QUESTION PRESENTED FOR REVIEW.

Is a corporation which owns a theatre and voluntarily leases it to an operator entitled to bring suit under the Clayton Act for an alleged conspiracy relating to the licensing of pictures at the theatre by the lessee-operator?

STATEMENT OF THE CASE.

This is an action under the antitrust laws brought by the owner, but not the operator, of the Yorktown Theatre, in Montgomery County, Pennsylvania.

The Yorktown is, and since its opening in 1934 has been, leased to and operated by Warner Theatres, Inc. The lease, which expires in 1965, provides for a fixed annual rental, plus a percentage of lessee's receipts.

The gravamen of plaintiff's complaint is as follows: Prior to November, 1950, the Yorktown had the first run of pictures in its territory, that is, the defendant-distributors licensed pictures for exhibition there on a run 28 days after exhibition in downtown Philadelphia, with a clearance of seven days over the Glenside Theatre. Dante Iacampo, the former operator of the Glenside, which is approximately three miles from the Yorktown, had sued to obtain for the Glenside the same run as that enjoyed by the Yorktown, contending that the two theatres were not in substantial competition. On November 14, 1950, pursuant to a settlement agreement among the parties to the Iacampo suit, their counsel joined in a stipulation of dismissal.[1] Thereafter, plaintiff alleges, the Glenside and Yorktown exhibited pictures at the same time (Paragraph 18(a)).

According to plaintiff, this change [the elimination of the prior clearance or restriction which had favored the Yorktown over the Glenside] reduced the receipts of Warner Theatres, Inc., plaintiff's lessee at the Yorktown, resulting in a diminution of the percentage rentals received by the plaintiff under its lease.

Defendants moved for summary judgment on the ground that any injury suffered by plaintiff was beyond the limits of injuries cognizable in a private suit under the antitrust laws because it was too remote, uncertain and insubstantial to support an action under those statutes.

Chief Judge Kirkpatrick granted defendants' motion on the basis of the holding in **Harrison v. Paramount**, 115 F. Supp. 312, affirmed *per curiam*, 211 F. 2d 405 (3rd Cir., 1954), cert. denied 348 U. S. 828 (1954).

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1. Plaintiff's lessee, Warner Theatres, Inc., which was joined in the present case, was not a party to the Iacampo litigation, or to the stipulation dismissing it (Dante Iacampo v. Loew's Incorporated, et al., E. D. Pa., Civil Action No. 9272). Nor was defendant Glenside Theatre Corporation, which succeeded Iacampo as operator of the Glenside Theatre, a party to the Iacampo case.

The Court of Appeals for the Third Circuit (Judges Maris, McLaughlin and Hastie) unanimously affirmed Chief Judge Kirkpatrick in a *per curiam* opinion, stating that "a non-operating lessor-owner of a motion picture theatre who is entitled to rental based on a percentage of receipts is nonetheless not a 'person injured in his business or property' within the meaning of Section 4 of the Clayton Act, and, therefore, is not entitled to bring suit under the Act for an alleged conspiracy relating to the licensing of pictures at the theatre by the lessee-operator."

A petition for rehearing was denied by the Court of Appeals (Judges Maris, Goodrich, McLaughlin and Hastie), the Court stating: "We adhere to the rule laid down in the **Harrison** case. We think that it is a sound rule and that it is applicable to this case." Chief Judge Biggs dissented.

Argument.

The two principal grounds relied upon by plaintiff to justify certiorari are that (1) the antitrust status of a theatre lessor is of importance to the motion picture industry and to the effective enforcement of the antitrust laws, and (2) there is a confusion of judicial authorities concerning the antitrust status of a percentage-lease landlord which compels clarification by this Court (Pl. Br. pp. 7, 8).[2] Neither of these suggested reasons, which we shall analyze in inverse order, is valid.

I.

THERE IS NO CONFUSION AMONG JUDICIAL AUTHORITIES ON THE LANDLORD'S STATUS TO SUE UNDER THE ANTITRUST LAWS.

This case presents a narrow issue involved in a few private antitrust cases brought in the motion picture industry. In those cases, as in this one, a landlord dissatisfied with the manner in which its tenant has operated the theatre has attempted to maintain a separate suit on its own behalf.

The leading authority on the non-operating landlord's lack of standing to sue under the antitrust laws is **Harrison v. Paramount**, 115 F. Supp. 312. There, the owner, but not the operator, of the Bryn Mawr Theatre sued on the ground that the distributors and the lessee of the theatre, Fried, had conspired to keep the Bryn Mawr's run after that of other theatres on the Philadelphia Main Line.

In affirming the jury verdict for defendants, Chief Judge Kirkpatrick pointedly stated (p. 316):

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2. Plaintiff's Brief is referred to as "Pl. Br."

"* * * if this landlord has any rights at all in the property which could be injured by a conspiracy to withhold first-run pictures, directed against or participated in by the tenant, they are remote, uncertain and insubstantial."

The Court of Appeals for the Third Circuit (Judges Maris, McLaughlin and Hastie) affirmed Judge Kirkpatrick on the basis of his "well-reasoned opinion" (211 F. 2d 405, 1954).

This Court denied certiorari, 348 U. S. 828 (1954).

One of the cases heavily relied upon by **Harrison** was **Westmoreland Asbestos Co., Inc. v. Johns-Manville Corporation**, 30 F. Supp. 389 (S. D. N. Y. 1939), aff'd., 113 F. 2d 114 (2d Cir. 1940), which is direct authority that a landlord may not recover for injury to him resulting from a conspiracy directed against his tenant.

In **Westmoreland**, the alleged conspiracy was directed against a trading corporation which occupied a position similar to the operator-tenant in the present case. The trading corporation was a tenant of Kuehn, Inc., and Mr. Kuehn was the sole shareholder of Kuehn, Inc. The complaint was that the defendants conspired to drive the tenant out of business, with the result that the tenant could not pay rent to its corporate landlord. The landlord, therefore, could not pay its mortgage, which was foreclosed. This is a far more direct result than mere loss of a portion of the claimed rental which might have been paid to the landlord if the tenant had operated the theatre in a different manner.

As to Mr. Kuehn, the Court followed **Gerli v. Silk Ass'n. of America, et al.**, 36 F. 2d 959 (S. D. N. Y. 1929), which held that, because of remoteness, a shareholder could not recover for injuries to his corporation.

Although the **Gerli** case had not considered the right of the landlord to recover, the court in **Westmoreland** found

no difficulty in dismissing the claim even as to the landlord, Kuehn, Inc., based on loss resulting from its tenant's inability to pay rent because of defendant's conspiracy to drive the tenant out of business, stating (30 F. Supp. 389, at 391):

> "* * * All elements considered, it seems to me that the claimed damages of Kuehn, Inc. and Kuehn individually are more remote than those held to be unrecoverable in the Gerli case; * * *."

The **Westmoreland** case is a square holding that the lessor, by reason of the remoteness of its relationship to the defendants, had no cause of action which it could assert. It was not new law in 1939, when it was decided. It was merely a logical result of decisions going back nearly 40 years, holding that only those directly aimed at and directly hit by the claimed conspiracy had any standing to sue.

The Court of Appeals for the Second Circuit followed its holding in **Westmoreland** in the recent case of **Productive Inventions v. Trico Products Corp.**, 224 F. 2d 678 (2d Cir. 1955). There, the plaintiff had granted to a manufacturer, on a royalty basis, an exclusive license on a patent which plaintiff owned. Thereafter plaintiff filed a suit under the Clayton Act to recover for the alleged royalties it would have received on sales which its licensee was prevented from making by antitrust violations of a competing manufacturer.

The Court of Appeals, citing **Westmoreland** and relying on what it called Judge Kirkpatrick's "reasoned opinion" in **Harrison**, granted summary judgment for defendant.

This Court, as it did in the **Harrison** case, denied the petition for certiorari.

In **Walder v. Paramount Publix Corp.**, 1956 Trade Cases, par. 68,275, at p. 71, 264 (S. D. N. Y.), Judge Leibell

also followed **Harrison** in holding that the lessor of a theatre in circumstances similar to those here, had no right to maintain an antitrust suit against motion picture distributors.

Indeed, there has been no judicial disapproval or even questioning of the **Harrison** decision.

Even **Steiner v. Twentieth Century-Fox Film Corp.**, 232 F. 2d 190 (9th Cir., 1956), relied upon by plaintiff, quotes with approval the holding in **Harrison** that an antitrust suit requires as its basis a **direct**[3] violation of a legal right in plaintiff.

In **Steiner**, the lessor of a theatre brought suit against his lessee and certain distributors, charging a conspiracy to monopolize the exhibition of motion pictures. The complaint alleged that the defendants forced plaintiff to accept less than the reasonable rental value of his theatre, to accept unfavorable lease terms, and to grant lease renewal options without adequate consideration, and that pursuant to the alleged conspiracy directed against it, the landlord, the theatre was closed.

In distinguishing **Steiner** from **Harrison**, Judge McLaughlin emphasized that the injury to Steiner was the result of "**direct** dealings between the plaintiff and defendant." The **Steiner** distinction was based on the fact, not present in the instant case, that "the complaint asserts the appellees in concert with the [lessees] forced the **appellant** [lessor] to do acts detrimental to her reversionary interest. * * *" In the present case, there is no allegation that defendants conspired to force **plaintiff** to do anything at all. The injury claimed by plaintiff was not the result of dealings between plaintiff and any of the defendants pursuant to the alleged conspiracy, but was the result of the incidental, indirect impact of the alleged conspiracy on a lease

3. Wherever bold face appears in this Brief the emphasis is ours.

previously made by the plaintiff and its lessee, voluntarily and unaffected by any alleged misconduct.

In **Steiner**, the target of the alleged conspiracy was the lessor-plaintiff; in the present case the alleged target is the lessee.

In support of its claim that the decisions are in confusion, plaintiff cites (Pl. Br. pp. 8, 9) **Camrel Co., Inc. v. Paramount Film Distributing Corp.**, 1944-1945 Trade Cases, ¶ 57,233 (S. D. N. Y., 1944) and **Essaness Theatres Corp. v. Balaban & Katz Corp.**, 1955 Trade Cases ¶ 68,152 (N. D. Ill., 1955). However, these decisions, like **Steiner**, are clearly distinguishable from the present case.

In **Camrel**, it was alleged that **plaintiff** had demanded and defendants had refused to give to **plaintiff** the run required by its theatre, and that **plaintiff** was deprived of access to pictures for exhibition.[4] This is in sharp contrast to the present case in which there is **no** allegation that plaintiff demanded pictures, that plaintiff was willing to pay film rentals for them, or that defendants refused to give plaintiff the run required by its theatre.

Since the plaintiff in **Camrel** had occupied the position of operator as well as owner and dealt directly with the distributors, the court's decision there to deny the defendants' motion to dismiss is not inconsistent with the **Harrison** rule.

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4. The complaint in the **Camrel** case, *supra*, alleged, *inter alia*, that:

"27. * * * every **owner** and operator of the Cameo Theatre **demanded** of defendants and each of them, the same run of pictures with the same clearance as theretofore enjoyed by the Cameo Theatre. But all of said demands and claims were rejected by defendants and each of them.

"32. By reason of the foregoing, this **plaintiff**, and its tenants have been deprived of access to a free, open and untrammeled market to purchase or lease motion pictures for exhibition at the Cameo Theatre based upon their ability and willingness on part of **plaintiff** and its tenants to pay fair and reasonable film rentals."

Certainly in view of **Westmoreland** and **Productive Inventions**, discussed at pages 5 and 6, there can be no doubt that the law of the Second Circuit is in complete accord with that of the Third Circuit. Indeed, **Harrison** is cited as direct authority there.

In **Essaness Theatres**, also, the court noted that the plaintiff had occupied the position of operator as well as owner and dealt directly with the distributors, and for this reason expressly distinguished the case from the **Harrison** decision, which it inferentially accepted as a proper one.

Further, in support of its claim that there is confusion of judicial authorities concerning the antitrust status of a percentage-lease landlord, plaintiff refers (Pl. Br. p. 9) to **Roseland v. Phister Mfg. Co.**, 125 F. 2d 417 (7th Cir. 1942) and **McWhirter v. Monroe Calculating Machine Company**, 76 F. Supp. 456 (W. D. Mo. 1948).

These cases do not support plaintiff's contention for two reasons. First, they merely indicate that a salesman, or one similarly situated, may recover in an appropriate case where he has been deprived of his compensation, although that compensation is computed on a commission basis; they do not hold that such a person may recover in his own right for an injury consisting of a diminution of receipts by the company from which his compensation was derived, as in the landlord situation. Second, they contemplate a **direct** injury, and not the indirect type of injury found in the present case.

In **Roseland**, plaintiff was a general sales agent and merchandise broker for several manufacturing companies, maintaining his own sales office in Chicago. He complained that Phister and the other two defendants had conspired in such a manner as to deprive him of the opportunity of making sales in certain territories where he was Phister's exclu-

sive representative. The impact of the deprivation was **directly** on the plaintiff, and the situation is therefore not comparable to that in the present case where plaintiff's relation to the alleged loss of patronage is **indirect.**

In **McWhirter,** the complaint was not based on any alleged conspiracy. Instead, it involved violation of the Robinson-Patman Act. Defendant, Monroe, was charged with reducing prices, which in turn diminished the commission received by the plaintiff, who had his own sales organization which dealt in Marchant calculating machines. The effect of the alleged price discriminations by defendant in the sale of Monroe machines was to impair **plaintiff's** ability to sell the Marchant brand.

The court specifically referred to the directness of the injury to the plaintiff, stating (p. 460) "* * * **this plaintiff** * * * was prevented from making sales and was thereby damaged." Thus, the plaintiff's position in **McWhirter** is analagous to that of the tenant, or operator, of a motion picture theatre who has been deprived of patronage—not to that of the landlord.[5]

II.

A RESULT CONTRARY TO THE HARRISON RULE WOULD BURDEN THE INDUSTRY.

Plaintiff contends that the grant of a right to a landlord to sue under the Clayton Act, in the circumstances present here, is of importance to the motion picture industry (Pl. Br. p. 7). Just the reverse is true, as Chief Judge Kirkpatrick observed in the **Harrison** case.

In the day to day operation of the industry, a sharp conflict between the economic interests of the operator and those of his landlord is not improbable. The operator in

5. In **McWhirter,** judgment was eventually entered for defendant, the court concluding that "Plaintiff has not sustained the burden of showing damages * * *" (p. 465).

many instances might find later showing, with lower film rentals and operating costs, more profitable, though gross receipts and consequently percentage rentals would be higher with first-run showing. If the landlord, therefore, wanted a first-run for his theatre, would the distributors be subject to suit if they heeded the operator's request for a later showing? Or would the distributors be subject to suit by the operator if they heeded the request of the landlord?

In addition, there are many practical problems confronting the distributors and operators if the owner of each leased theatre must be satisfied.

The distributor would have to determine who is the owner of the theatre, and would then have to locate him. This may be complicated by changes of ownership, by transfers, or by devolution. The distributor would also be obliged to obtain and analyze leases to ascertain the tenant's rights and obligations to make sure that its dealings with the tenant comply with them. While this is being done, how is the distributor to license its pictures?

Moreover, having leased the theatre, the owner is in no position to contract for pictures—only the operator may do so.

As Chief Judge Kirkpatrick pointed out in **Harrison** (115 F. Supp. 312, 317):

> "* * * The difficulties which would arise unless some consideration be given to the remoteness or indirectness of the injury are particularly apparent in the motion picture business, in which thousands of theatres are owned by persons who have nothing to do with the operation of them and no right to interfere. * * * In such a situation, where a tenant desires a particular kind of product, must the distributors seek out the owner of the building to ascertain whether they can safely give the tenant what he wants? It seems clear that unless a line is drawn excluding remote and indirect injuries to property owners in similar cases, an

almost intolerable burden would be placed upon the whole industry."

Opening the door to antitrust suits by persons who are not engaged in the trade or industry concerned, not targets of an alleged conspiracy, and not otherwise directly affected by the alleged violation, would be to open the flood gates to virtually unlimited litigation. Unless the right to maintain a suit is limited, potential plaintiffs would include owners and tenants of adjoining stores, refreshment concessionaires, theatre ticket makers, and the myriad other persons whose businesses are affected in some manner by the operation of a motion picture theatre. Every operator of a store in a shopping center,—where each business is interdependent for patronage upon the draw of every other business in the center,—would be permitted to recover for injury to any business in the center resulting from antitrust violation.

This was one of the crucial points of Chief Judge Kirkpatrick's opinion in the **Harrison** case, with which the Court of Appeals for the Third Circuit found itself in "complete accord." Judge Kirkpatrick stated (p. 317):

> "* * * it would seem that the courts recognize that the Act does not give a right of action to everyone who can trace a financial loss, however remote, to a violation of the antitrust laws."

III.

THE HARRISON RULE IS IN LINE WITH OTHER CASES LIMITING THOSE WHO MAY SUE UNDER THE CLAYTON ACT.

Plaintiff attempts to create the impression that the denial of a right of action to a landlord under the Clayton Act runs "counter to the main stream of judicial decisions which indicate that such lessor is well within the group of

persons whose injuries are recoverable" (Pl. Br. p. 13). Just the reverse is true.

As early as 1910, in **Loeb v. Eastman Kodak Co.**, 183 Fed. 704 (3rd Cir., 1910), it was held that the plaintiff as a shareholder and creditor of a company allegedly ruined as a result of defendant's illegal monopoly, had no cause of action. The court stated (p. 709):

> "• • • it is manifest that the plaintiff did not receive any **direct injury** from the alleged illegal acts of the defendant. No conspiracy or combination against him as a stockholder or creditor is alleged. The **injury complained of was directed at the corporation, and not the individual stockholder.** Hence any injury which he, as a stockholder, received was **indirect, remote, and consequential.** • • • A creditor would apparently be injured in the same way and to the same extent as a stockholder, assuming that their interests were equal. • • •"

It is now well-settled law that a shareholder has no cause of action for an alleged antitrust violation directed against the corporation. **Gerli v. Silk Ass'n. of America, et al.**, 36 F. 2d 959 (S. D. N. Y. 1929).

In 1916, the Court of Appeals for the Second Circuit stated in **United Copper Securities Co. v. Amalgamated Copper Co., et al.**, 232 Fed. 574, 577:

> "• • • The person injured must be engaged in a business **directly,** or at least not remotely, affected by the conspiracy complained of. One who had rented offices to corporations absorbed by an illegal combination could not recover for losing them as tenants, nor a lawyer regularly retained for losing them as clients. • • •"

A similar conclusion was reached in **Conference of Studio Unions, et al. v. Loew's Inc., et al.**, 193 F. 2d 51

(9th Cir., 1951), cert. denied, 342 U. S. 919 (1952). There the Court of Appeals stated (p. 55):

> "* * * Recovery and damages under the anti-trust law is available to those who have been **directly** injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm."

Consequently, the rule of the **Harrison** and **Productive Inventions** cases does not involve any new or startling doctrine of law. It is in accord with all the prior cases on the same subject.

In an endeavor to support its proposition that the rule of **Harrison** and **Productive Inventions** is a departure from the fabric of antitrust law, plaintiff cites a series of cases which are inapposite (Pl. Br. pp. 11, 12, 13).

In **Chattanooga Foundry and Pipe Works v. City of Atlanta**, 203 U. S. 390 (1906), the City sued for damages suffered when an alleged combination kept the price of water pipe higher than the market price, thereby causing the City to pay more for pipe for its water system than it otherwise would have paid. All the Court held was that the City was a "person" with the right to sue under the anti-trust laws. There was no discussion of the problem of direct as distinguished from incidental injury,—which is the crux of the present case.

In **Vines v. The General Outdoor Advertising Co., Inc.**, 171 F. 2d 487 (2d Cir. 1948), the plaintiff had been engaged by the defendant as a solicitor of outdoor advertising, and derived a commission from certain accounts. He complained that the defendant transferred to another agency one of plaintiff's accounts. Plainly, the injury to the plaintiff was **direct** since defendant's conduct resulted in ter-

minating plaintiff's relationship as solicitor of the account, and in depriving him of the attendant compensation.

The defendants in **Moore v. Backus**, 78 F. 2d 571 (7th Cir., 1935), combined to corner the market in order to maintain a higher price level, thus damaging the plaintiff who had sold short. This, too, was a direct injury to the plaintiff.

In **Thompsen v. Union Castle Mail S. S. Co.**, 166 Fed. 251 (2d Cir. 1908), the defendants conspired to prevent plaintiff from operating in the steamship business. In **Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.**, 166 Fed. 254 (2d Cir. 1908), the defendants had combined to prevent the plaintiff from re-opening its sugar refinery, despite substantial expenditures made by plaintiff in its refinery. And in **Wm. Goldman Theatres v. Loew's**, 150 F. 2d 738 (3d Cir. 1945), the defendants were charged with conspiring to prevent the plaintiff from operating on a first-run downtown basis.

It is clear that in each of these cases the plaintiffs were the targets of the alleged conspiracies and the damages claimed were clearly "direct" and not incidental as in the present case.

In **Bigelow v. RKO Radio Pictures, Inc.**, 327 U. S. 251 (1946) and **Finley v. Music Corporation of America**, 66 F. Supp. 569, 571 (S. D. Calif., 1946) the damages were also direct; the question was merely as to the quantum of proof necessary in an antitrust case.

CONCLUSION.

The law is clear that a non-operating landlord (as in this case) does not have a cause of action under the Clayton Act against distributors who license pictures to the landlord's tenant. Petitions for certiorari addressed to this Court in comparable cases in 1954 and 1956 have been denied. Subsequent to the denial of these petitions, the courts without exception have followed the rule of these

cases. The rule is based on the established principle that only plaintiffs suffering direct injury may sue under the Clayton Act, and is salutary since otherwise an "intolerable burden would be placed" on the motion picture industry.

The petition for certiorari should be denied.

Respectfully submitted,

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OCT 5 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. 355.

MELROSE REALTY CO., INC.

v. *Petitioner,*

LOEW'S INCORPORATED; PARAMOUNT FILM DISTRIBUTING CORPORATION; R. K. O. RADIO PICTURES, INC.; TWENTIETH CENTURY-FOX FILM CORPORATION; COLUMBIA PICTURES CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION; STANLEY COMPANY OF AMERICA, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; UNITED ARTISTS CORPORATION; DANTE IACAMPO, Individually and Formerly Trading as the GLENSIDE THEATRE; GLENSIDE THEATRE CORPORATION and WARNER BROS. THEATRES, INC., Now Known as WARNER THEATRES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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ARGUMENT.

The Respondents have relied heavily on the case of *Harrison v. Paramount Pictures, Inc.*, 211 F. 2d 405 (3rd Cir., 1954), *cert. den.* 348 U. S. 828 (1954), and have argued, first, that *Camrel v. Paramount Film Distributing Corp.* 1944-1945 Trade Cases, ¶ 57,233 (S. D. N. Y., 1944), is not inconsistent with the *Harrison* rule and second, that the governing facts in the instant case are not distinguishable from the facts in the *Harrison* case.

This reply brief is written because of these two serious and damaging misstatements in Respondents' brief. The Petitioner feels that a correction is indispensable to a fair and proper consideration of this Petition for Certiorari.

I. The Harrison and Camrel Cases Are Factually Congruent and Legally Irreconcilable.

Respondent has attempted to distinguish the *Camrel* case from, and harmonize it with, the *Harrison* case by stating that:

> "Since the plaintiff in **Camrel** had occupied the position of operator as well as well as owner and dealt directly with the distributors, the court's decision there to deny the defendants' motion to dismiss is not inconsistent with the **Harrison** rule (Resp. Br., p. 8).

However, Respondents are completely in error. In *Camrel*, plaintiff was the owner of the theatre. But it was *not* the operator. The first sentences of the *Camrel* opinion make this quite clear by stating:

> "Plaintiff has been the owner of the Cameo Theatre . . . since October 25, 1938. **It does not, however, operate it"** (Emphasis supplied).

Therefore as to these facts, *Camrel* and *Harrison* are on all fours. Consequently, the divergent results reached by the two courts make these cases irreconcilable.

However, Respondents also attempt to explain the *Camrel* decision by stating that there the owner had dealt directly with the defendants in demanding the end of the conspiracy (Resp. Br., p. 8).

If this distinguishes the *Camrel* case from *Harrison*, then it also distinguishes the instant case. For, as pages 5 and 6 of the Petition for Certiorari make clear, Respondents dealt directly with the Petitioner prior to the inception of the conspiracy, and they persisted in the conspiracy despite repeated protests by the Petitioner.

Thus, if direct dealings by a landlord are required to attain the right to sue, they exist here. If not, *Camrel* and *Harrison* are irreconcilable.

II. The Facts in the Harrison and the Instant Case Are Distinguishable: Here the Lessee Is a Co-Conspirator—in Harrison, It Was Not.

In discussing the *Harrison* case, Respondents have stated that:

> "There the owner, but not the operator, of the Bryn Mawr Theatre sued on the ground that the distributors and the lessee of the theatre, Fried, had conspired to keep the Bryn Mawr's run after that of other theatres on the Philadelphia Main Line" (Resp. Br., p. 4).

This language indicates that the *Harrison* case involved a landlord whose lessee, at time of suit, was a party to the conspiracy. This is not the case.

The correct factual situation in *Harrison* was this: The complaint alleged a conspiracy continuing from 1939 until 1951, the date of suit. It further alleged that Fried, who was the lessee until 1945 was a co-conspirator. However, the trial transcript shows that from 1945 until 1951, the Plaintiff's lessee was William Goldman Theatres, Inc. That lessee not only was not named as a co-conspirator, but for

six years prior tto the suit had actively attempted to secure the change of ruun which the landlord desired. The lessee in the *Harrisonn* case was therefore in a position to take action calculatedd to protect both itself and the landlord.

In the instannt case, the lessee was an active participant in the conspiracyy, and was so named in the complaint.

When the Lesssee Is a Co-Conspirator, the Landlord Must be Allowed to Sue.

Admitting *aarguendo* that the Harrison rule is correct where the lessee is free to bring suit, it can not apply where the lessee is a paarty to the conspiracy.

This distinection is vital. Under the *Harrison* theory, the lessee is thee party primarily injured and the landlord must look to thee lessee for protection of their mutual interests. But where the lessee is involved in the conspiracy, the landlord is tthe innocent party primarily hurt, the party in the immediatte "line of fire" of the conspiracy. He can not look to the leessee for aid; only he can protect his own—and the public—interest.

The Respomdents have argued that, if the landlord with a percentaage lease has anti-trust standing, similar rights must be granted to any other businessman whose trade depends iin any way upon the theater's customers (Resp. Br., p. 12). But the landlord is clearly in a special position. Who elsse but the landlord has contractual rights based on the receipts of the theater at which his lessee's conspiracy is aiimed? Who else is so obviously the target of such a conspiiracy? And who is better situated to protect his—and thee public's—interest in preserving free competition than tthe landlord affected?

The Respomdents go further and state that were a landlord to have anti-trust standing, neither the distributors nor the lessees could take business action of any sort without first obtaining landlord approval at great inconvenience (Resp.. Br., p. 11).

Such an argument is without merit. Of course the lessee has the right to make ordinary business decisions without interference by his landlord, and certainly the distributors can enter into legitimate business agreements with such lessees without liability. But one thing they can not do. **They can not enter into a conspiracy in restraint of trade and expect sanctuary from attack.** This is especially important where the lessee is a party to the conspiracy, for in such a situation, if the landlord can not sue, no private party can. And if allowing anti-trust standing to theatre owners will make such consipracies less inviting, then not only landlords but the entire public will benefit.

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REPLY BRIEF FOR RESPONDENTS.

Plaintiff asserts that its Reply Brief was occasioned by what it terms "two serious and damaging misstatements" in defendants' Brief in Opposition. The purported "misstatements" relate to defendants' argument that **Harrison v. Paramount**, 115 F. Supp. 312, affirmed *per curiam*, 211 F. 2d 405 (3d Cir. 1954), cert. denied, 348 U. S. 828 (1954) is, on the one hand, distinguishable from **Camrel v. Paramount Film Distributing Corp.**, 1944-1945 Trade Cases, par. 57,233 (S. D. N. Y. 1944) and, on the other hand, governs the present case.

Defendants' contention that **Camrel** is distinguishable from **Harrison** on the ground that "the plaintiff in **Camrel** had occupied the position of operator as well as owner and dealt directly with the distributors" (Resp. Br. p. 4) is double-edged. Plaintiff has attempted to parry instead of squarely meeting the thrust of this two-fold argument. To this end, plaintiff has cited the brief memorandum of the court in **Camrel** without giving proper consideration to the pleading upon which it was based. In one respect plaintiff has ignored defendants' quotation from the **Camrel** complaint (Resp. Br. p. 8, n. 4), and in another respect plaintiff has misstated it.

The quotation from the **Camrel** complaint shows, first, that the plaintiff there had been in the position of an operator since it demanded a specified run of pictures and clearance and represented itself as able and willing to pay film rentals in order that it might have access to the market for leasing of pictures for exhibition. These are functions of an operator which the plaintiff there undertook to perform.

The quotation also shows that the plaintiff in **Camrel** had averred demands, not for "the end of the conspiracy" as plaintiff now asserts (Reply Brief, p. 2), but for a specified "run of pictures" and "clearance".

It was plaintiff in this case which asserted (without having alleged it in its complaint) that it had demanded an "end" to the alleged conspiracy (Br. p. 6). Plaintiff now asserts, with nothing in the record to support it, that prior to the "inception" of the alleged conspiracy, it had "dealt

directly" with defendants, suggesting that these dealings were like those in **Camrel** which related to such details of operation as run, clearance and film rentals.

In a last minute attempt to make the facts of this case parallel those of **Camrel**, plaintiff has confused and incorrectly stated the two cases.

In any event, if **Camrel** were interpreted, as plaintiff suggests, to make it indistinguishable from **Harrison**, it would have no force. This is so since the Court of Appeals for the Second Circuit in **Westmoreland Asbestos Co., Inc. v. Johns-Manville Corporation**, 30 F. Supp. 389 (S. D. N. Y. 1939), aff'd., 113 F. 2d 114 (1940) and **Productive Inventions v. Trico Products Corp.**, 224 F. 2d 678 (1955), has concluded that a landlord in circumstances similar to those here has no standing to sue, and since the Southern District Court of New York, itself, has now followed this rule in **Walder v. Paramount Publix Corp.**, 1956 Trade Cases, par. 68,275, at p. 71,264.

To establish a second alleged "misstatement" by defendants plaintiff suggests that the Court ignore a major part of the **Harrison** litigation and confine itself to comparing the relationship of the parties in the suit only as of the time the complaint was filed (Reply Brief, p. 2). In **Harrison**, it is true that the lessee at the time of suit had not been named as a co-conspirator. However, as is evident from plaintiff's own statement of the "correct factual situation in **Harrison**" (Reply Brief, p. 2), it was there alleged that "Fried, who was the lessee until 1945, was a co-conspirator."

Thus, there were two lessees in the **Harrison** situation; one had been named as a co-conspirator, and the other had not. Judge Kirkpatrick held that in either event, the landlord was without standing to sue. This holding is set forth in that portion of his opinion which defendants have quoted in their Brief (p. 5):

> ". . . if this landlord has any rights at all in the property which could be injured by a conspiracy to

withhold first-run pictures, **directed against or participated in by the tenant,** they are remote, uncertain and insubstantial."

It is clear, therefore, that plaintiff cannot distinguish his case from **Harrison** by asserting that the lessee here is an alleged co-conspirator while the lessee in **Harrison** was not.

Plaintiff's attempt to do so was not successful before Judge Kirkpatrick or the Court of Appeals. The contention should not gain greater force by plaintiff's unjustifiably touching it in terms of asserted misrepresentations of fact by defendants.

Plaintiff's claims of mistatement are unfounded; and its asserted distinctions are without merit.

The petition for certiorari should be denied.

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